791.

SUPREME COURT OF THE UNITED STATES.

No. 54.

THE OCEAN INSURANCE COMPANY, PL'FF IN ERROR,

VERSUS

WILLIAM POLLEYS.

ERROR TO THE SUPREME JUDICIAL COURT OF MAINE.

INDEX.

	Original.	*Print.*
Writ of Error	1	3
Bond for prosecuting Writ of Error	3	4
Citation	5	5
Service of Citation	6	5
Assignment of Errors	7	6
Writ of Attachment	10	7
Sheriff's Return	15	10
Issues Joined	16	11
Bill of Exceptions	17	11
Declaration of Plaintiff	23	13
Defendant's Plea	32	14
Plaintiff's Plea—Verdict of Jury—Motion for a new trial	33	18
Motion for new trial overruled	34	18
Judgment—Clerk's Certificate	34	18

Langtree & O'Sullivan, Print.

UNITED STATES OF AMERICA, *ss.*

The President of the United States to the honorable the Judges of the Supreme Judicial Court of the State of Maine, holden at Portland, in and for the county of Cumberland, in said State, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Judicial Court before you, or some of you, being the highest court of law or equity of the said State, in which a decision could be had in the said suit between William Polleys, plaintiff, and the Ocean Insurance Company, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Ocean Insurance Company, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of August next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the honorable Roger B. Taney, Chief Justice of
[SEAL.] the said Supreme Court, this second Monday of January, in the year of our Lord one thousand eight hundred and thirty-eight.

WM. THOS. CARROLL,
Clerk of the Supreme Court of the United States.

Allowed by

NATHAN WESTON,
Chief Justice of the Supreme Judicial Court of Maine.

Writ of Error.

STATE OF MAINE.

Pursuant to the mandate of this writ, I, Nathan Weston, chief justice of the supreme judicial court of Maine, do hereby, distinctly and openly, send the record and proceedings therein described, and all things concerning the same, to the Supreme Court of the United States, at Washington, to be holden at the time mentioned in said writ.

In testimony whereof, I have hereto set my hand, and caused to be affixed the seal of said Supreme Judi-
[SEAL.] cial Court of Maine, on this twenty-second day of May, in the year of our Lord eighteen hundred and thirty-eight.

NATHAN WESTON.

Copy of Appeal Bond.

Know all men by these presents, that we, the Ocean Insurance Company, a corporation established by an act of the Legislature of the State of Maine, and transacting business in the city of Portland, in said State of Maine, (by George Bartol, president of said company, and also specially authorized to sign and seal this instrument in behalf of said company,) as principal, and William Woodbury and Eliphalet Greely, both of said city of Portland, merchants, as justices, are held and firmly bound unto William Polleys, of Cape Eliza, both in the county of Cumberland, and State of Maine, mariner, in the full and just sum of eight thousand dollars, to be paid to the said William Polleys, his certain attorney, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this first day of May, in the year of our Lord one thousand eight hundred and thirty-eight.

Whereas, lately, at a Supreme Judicial Court of the State of Maine, holden at Portland, in and for the county of Cumberland, in said State, in a suit depending in said court, between the said William Polleys, plaintiff, and the Ocean Insurance Company, defendants judgment was rendered against the said Ocean Insurance Company for the sum of three thousand six hundred sixty-six dollars and thirty-seven cents; and the said Ocean Insurance Company having obtained a writ of error, and filed a copy thereof in the clerk's office of the said Supreme Judicial Court to reverse the judgment in the aforesaid suit, and a citation, directed to the said William Polleys, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington the first Monday of August next.

Now the condition of the above obligation is such, that if the said

Ocean Insurance Company shall prosecute said writ of error to effect, and answer all damages and costs, if they fail to make their plea good, then the above obligation to be void; else, to remain in full force and virtue.

THE OCEAN INSURANCE COMPANY,
By GEORGE BARTOL, [SEAL.]
WILLIAM WOODBURY, [SEAL.]
ELIPHALET GREELY. [SEAL.]

Sealed and delivered in presence of
HENRY B. WRIGHT.

Approved by
NATHAN WESTON, *C. J. S. J. C.*

I, Charles Fox, clerk of the Supreme Judicial Court in the county of Cumberland, certify that the within is a true copy of the original bond, carefully compared by me, which original is now on file in my office.

CHARLES FOX, *Clerk.*

Citation.

The United States of America to William Polleys, of Cape Elizabeth, in the District of Maine, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of August next, pursuant to a writ of error, filed in the clerk's office of the Supreme Judicial Court of the State of Maine, holden at Portland, in and for the county of Cumberland in said State, wherein the Ocean Insurance Company are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Nathan Weston, chief justice of the Supreme Judicial Court of Maine, this first day of May, in the year of our Lord one thousand eight hundred and thirty-eight.

NATHAN WESTON.

STATE OF MAINE, *County of Cumberland.*

On this nineteenth day of May, in the year of our Lord one thousand eight hundred and thirty-eight, personally appeared David Wescott before me, the subscriber, one of the justices of the peace for the county of Cumberland, in the State of Maine, and makes oath

that he delivered a true copy of the within citation to William Polleys, of Cape Elizabeth, named in said citation, on the fifteenth day of May, in the present year, as is stated by him, said Wescot, in his official return, as below appears.

PRENTISS MELLEN,
Justice of the Peace.

MAINE DISTRICT, *ss.*

On the fifteenth day of May, in the present year, I delivered to William Polleys, named in the annexed citation, a true and attested copy of the same, in hand.

DAVID WESCOTT,
Deputy Marshal of Maine District.

$2 fees.

Errors to be assigned in the Supreme Court of the United States, to be held at the city of Washington, on the first Monday of August next, in a cause wherein the Ocean Insurance Company are plaintiffs in error, and William Polleys, is defendant, to obtain a reversal of judgment rendered in said cause in the supreme judical court of the State, against the said Ocean Insurance Company; the said Polleys in said supreme judicial court having been plaintiff, and said Polleys, defendant; and in the record and proceedings of which cause, the said Ocean Insurance Company complain and say, that manifest error hath intervened to the great damage of said Company: Wherefore, they pray that said judgment may be reversed and held for nought.

And the said Ocean Insurance Company now assign the errors in law following:

1. That it appears by the record and proceedings aforesaid, that the certificate of enrolment of the schooner named in the policy of insurance declared on in the original writ, by the name of the Mary, was procured by said Polleys, but a short time before the commencement of the year for which she was insured, knowingly in direct violation of the statute of the United States then in full force, of which statute he was bound to take notice.

2. That said certificate of enrolment was knowingly used for said schooner on the voyage upon which she was lost, during the year for which she was insured; she not being then actually entitled to the benefit thereof.

3. That a policy of insurance on a vessel prosecuting a voyage under a false and unlawful enrolment and certificate thereof, and in violation of a statute of the United States, is not a binding contract and cannot be enforced in a court of law.

4. That the said judgment was rendered against the said Company; whereas the judgment should have been in favor of the said Company, and that the said Polleys take nothing by his writ.

MELLEN AND DAVIS,
May 14, 1838. *Attorneys for said Company.*

STATE OF MAINE, *Cumberland, ss.*

To the Sheriff of our County of Cumberland, or his Deputy, greeting:

We command you to attach the goods or estate of the Ocean Insurance Company, a corporation within the State of Maine, to the value of six thousand dollars; and summons said defendants (if they may be found in your precinct) to appear before our justices of our supreme judicial court, next to be holden at Portland, within and for our said county of Cumberland, on the first Tuesday of November next, then and there in our said court, to answer unto William Polleys, of Cape Elizabeth, in said county, gentleman, in a plea of the case, for that the said Polleys, the plaintiff, on the seventeenth day of July, in the year of our Lord one thousand eight hundred and thirty-three, at Portland aforesaid, according to the custom of merchants, a certain writing commonly called a policy of insurance caused to be made by and between himself and the defendants, purporting thereby, and containing therein, that the said William Polleys did make insurance, and caused himself to be insured, lost or not lost by the defendants, the sum of three thousand dollars, upon the schooner Mary, at sea or in port, for one year, commencing the risk July the eleventh, one thousand eight hundred and thirty-three, at noon, and ending July 11, 1834, at noon, according to, and as by the said policy, in the words and figures following, to wit:

CHARLES FOX, *Clerk.*

No. 331. Ocean Insurance Company.

This policy of insurance witnesseth, that the President and Directors of the Ocean Insurance Company, do by these presents cause to be insured, lost or not lost, William Polleys, three thousand dollars, on the schooner Mary, at sea or in port, for one year, commencing the risk July eleventh, 1833, at noon, and ending July eleventh, 1834, at noon. Whereof is master for this present voyage, Lovett, or whosoever else shall be master in the said vessel, or by whatsoever other name or names the said vessel or master thereof, is or shall be named or called; beginning the adventure upon the said schooner as aforesaid, and to continue during the voyage aforesaid, on the vessel, until she shall be arrived and moored at anchor twenty-four hours in safety, and on the property until landed. Sum insured, $3,000.

And it shall be lawful for the said vessel in her voyage to proceed and sail to, touch and stay at, any ports or places, if thereunto obliged by stress of weather, or other unavoidable accidents, without prejudice to this insurance.

Touching the adventures and perils which the said Insurance Company are contented to bear, and take upon them in this voyage, they are, of the seas, fire, enemies, pirates, assailing thieves, restraints and detainments of all kings, princes, or people, of what nation or quality soever, barratry of the master, (unless the insured be owner of the vessel,) and of mariners, and all other losses, and misfortunes, which have, or shall come to the damage of the said schooner, or any part thereof, to which insurers are liable by the rules and customs of insur-

ance in Portland, provided that the insurers shall not be liable for any partial loss on hemp and flax, unless the loss amount to twenty per cent. on the whole aggregate value of such articles; nor for any partial loss on sugar, flax-seed, bread, tobacco, and rice, unless the loss amount to seven per cent. on the whole aggregate value of such articles; nor for any partial loss on salt, grain, fish, fruit, hides, skins, or other goods that are esteemed perishable in their own nature, unless it amount to seven per cent. on the whole aggregate value of such articles, and happen by stranding; nor for any partial loss on other goods, or on the vessel or freight unless it amount to five per cent. exclusive, in each case, of all charges and expenses incurred for the purpose of ascertaining and proving the loss; but the owners of such goods shall recover on a general average. And in case of any loss or misfortune, it shall be lawful for the insured, his factors, servants, and assigns, to sue, labor, and travel for, in and about the defence, safeguard, and recovery of the said schooner, or any part thereof, without prejudice to this insurance, to the charges whereof the said Insurance Company will contribute, in proportion as the sum insured is to the whole sum at risk. And so the President and Directors aforesaid, are contented, and do hereby bind the capital stock and other common property of the said Insurance Company, to the insured, his executors, administrators, and assigns, for the true performance of the premises, confessing themselves paid, the consideration due unto them for this insurance, by the insured, at and after the rate of twelve per cent. return premium to be made, if she lies up in the winter from the time the Company are notified.

Vessel valued at $3000, premium included.

Premium	- -	$22 50
Policy	- -	1 00
		$23 50

And it is hereby agreed, that if the insured shall have made any other insurance upon the schooner aforesaid, prior in date to this policy, then the said Insurance Company shall be answerable only, for so much as the amount of such prior insurance may be deficient towards fully covering the property at risk, whether for the whole voyage, or from one port of lading or discharge to another; and the said Insurance Company shall return the premium, or a rateable part thereof, upon so much of the sum by them insured, or for such part of the voyage as they shall be exonerated from by such prior insurance; excepting half per cent. which shall be retained in all cases of return premium, provided, that no return premium shall be made, for any passage, whereon the risk has once commenced. And in case of any insurance upon the said schooner, whether it be for the whole or part of the voyage, subsequent in date to this policy, the said Insurance Company shall nevertheless be answerable, to the full extent of the sum by them herein insured, without right to claim contribution from such subsequent insurers; and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such sub-

sequent insurance had been made. And in case of loss, such loss shall be paid in sixty days after proof and adjustment thereof, the amount of the premium note, if unpaid, and all sums due to the Company, from the insured, when such loss becomes due, being first deducted, and all sums coming due being first paid or secured to the satisfaction of the said President and Directors, they discounting interest for anticipating payment. It is also agreed, that in case of capture or detention, the insured shall not have the right to abandon therefor, until proof is exhibited of condemnation, or of the continuance of the detention (by capture or other arrest) for at least ninety days; and that the insured shall not abandon in consequence of the port of destination being blockaded, but the vessel shall in such case, have liberty to proceed to another port not blockaded, and there end the voyage, or wait a reasonable time for the blockade of the original port of destination to be raised; and that the acts of the insured or insurers in recovering, saving, and preserving the property insured in case of disaster, shall not be considered a waver or acceptance of an abandonment.

It is also agreed, that the insurers shall not be answerable for any charge, damage, or loss, which may arise in consequence of seizure, or detention, for or on account of illicit or prohibited trade, or trade in articles contraband of war; but the judgment of a foreign consular, or colonial court, shall not be conclusive upon the parties, as to the fact of there having been articles contraband of war on board, or as to the fact of an attempt to trade in violation of the laws of nations. It is also agreed, that this policy shall be void in case of its being assigned, transferred, or pledged without the previous consent in writing of the insurers. It is also agreed, that the insured shall not have the right to abandon the vessel for the amount of damage merely, unless the amount which the insurers would be liable to pay under an adjustment, as of a partial loss, shall exceed half the amount insured; and in case of a total loss of the vessel with salvage, the amount allowed out of the salvage to the officers and crew for wages earned, or services rendered previously to the loss, shall be considered as so much of the salvage applied to the use of the ship owners, even although the same should be allowed or paid under the name of salvage, and not as wages, and shall accordingly be deducted in adjusting the loss. It is further agreed, that if any dispute shall arise, relating to a loss on this policy, it shall be submitted to the judgment and determination of arbitrators mutually chosen, whose award in writing shall be conclusive and binding on all parties. The Company is not liable for wages or provisions, except in general average.

In witness whereof, the President of the said Ocean Insurance Company, hath hereunto subscribed his name, and caused the same to be countersigned by the Secretary, at their office in Portland, this seventeenth day of July, one thousand eight hundred and thirty-three.

PHILLIP GREELEY, *President.*

WM. H. WOOD, *Secretary.*

Of which writing of assurance made as above set forth, the said defendants had due notice:

And thereupon, thereafterwards, on the same day, in consideration that the said plaintiff had paid to defendants, the premium for three thousand dollars, according to the tenor of the aforesaid assurance, and promised to perform all things contained in the writing aforesaid on his, the said plaintiff's part, to be performed, the said defendants promised the said plaintiff, that they would become, and they said defendants did then and there become assurers of the said vessel for the time aforesaid, according to the tenor and effect of the writing aforesaid, for the said sum of three thousand dollars, to be assured by the writing aforesaid, being the sum by said defendants subscribed as aforesaid, and the said schooner Mary, on the tenth day of June, in the year of our Lord one thousand eight hundred and thirty-four, upon the high seas, by storms, and the violence of the seas, upon a voyage or trip which the said schooner was then performing from Portland, in the State of Maine, to Boston, in the Commonwealth of Massachusetts, was sunk and utterly lost.

And the plaintiff in fact avers, that he was at the time of effecting said policy of insurance, the true, and lawful, and sole owner of the said schooner Mary; that she was of the full and just value of three thousand dollars; that he continued to be the true, lawful, and sole owner of said schooner Mary from that time up to the time and day when the said schooner Mary was sunk and lost as aforesaid.

Of all which the said defendants at Portland aforesaid, to wit, on the fourteenth day of June last past, had notice and proof, and the said Polleys, the plaintiff, then and there abandoned to the defendants.

And although the said plaintiff hath performed all things on his part by virtue of said policy to be performed and done, yet the said defendants have not paid to the plaintiff the said sum of three thousand dollars, or any part thereof, although the said plaintiff, to wit, on the twentieth day of August current, demanded of, and requested the said defendants to pay the same, to the damage of the said plaintiff (as he says) the sum of five thousand dollars, which shall then and there be made to appear with other due damages. And have you there this writ, with your doings therein.

Witness, Prentiss Mellen, Esquire, at Portland, the twenty-sixth day of August, in the year of our Lord one thousand eight hundred and thirty-four.

WM. T. VAUGHAN, *Cl'k.*

On the back of the writ is the following writing:

CUMBERLAND, *ss.*

September 3d, 1834.

Pursuant to this precept, I have this day served the same on the within named President, Directors of the Ocean Insurance Company.

by giving William H. Wood, the clerk of said company, a true and attested copy of this writ on hand.

Service,	-	-	-	29
Copy,	-	-	-	1 50
				$1 79

D. WESCOTT, *D'y. Sh'ff.*

And the defendant's say that they never promised in manner and form, as the plaintiff has declared against them, and thereof puts himself on the country, by

MELLEN & DAVIS, *his attorney.*

And the plaintiff's likewise, by

FESSENDEN & DEBLOIS,
his attorneys.

SUPREME JUDICIAL COURT, AT PORTLAND,
November Term, 1836.

WILLIAM POLLEY'S,
vs.
OCEAN INSURANCE COMPANY.

This is an action of assumpsit on a policy of Insurance, bearing date July 17, 1833, upon the schooner called the Mary, and owned by the pl'ff, for the term of one year, commencing on the 11th of said July—sum insured $3,000. The said schooner, during the said year, viz: June 10th, 1834, was totally lost.

It appeared on trial that a sloop was built in 1816, and was enrolled by the name of the Sophronio, and was again enrolled in the custom-house in Portland by the *same* name, March 24th, 1832. That the said schooner Mary was built upon the keel, floor timbers, and naval timbers of the said sloop Sophronio, and the size enlarged nearly twelve tons, and the name of the Mary given to her after being so enlarged, and that this was known to the defendants at the time of executing the policy; and that the certificate of Mark Leavit, a copy of which is annexed, was procured by the *Plaintiff*, and presented to the custom-house to obtain the enrollment of the schooner *Mary* without any fraudulent intent to deceive or defraud, but with fair and honest intentions, as the jury believed. But that the enrollment of the sloop Sophronio was not first surrendered and delivered up at the custom-house, before the issuing of the enrollment of the Mary, which was on the 3d day of June, 1833.

The counsel for the defendant objected to the admission in evidence of the said enrollment of June 3, 1833, as contrary to the laws of the United States; but the judge overruled the said objection, and it was admitted, and the said counsel further insisted that said schooner on the voyage, on which she was lost, was sailing under

circumstances rendering her liable to forfeiture for a violation of said laws; and that therefore a policy on a vessel pursuing such a voyage, was not valued or legal and binding: but the said judge also overruled this objection as insufficient to bar said action. To prove a loss of the vessel within the terms of the policy, the plaintiff offered in addition to other evidence to read to the jury a copy of the deposition of James L. Young, which may be referred to for the character of the caption, and for evidence of its having been opened and filed. The original deposition had been taken at the request of the defendant to be used in said action, prior to a former term of this court, at which a trial took place, but was withdrawn by the defendant, tho' not during the term for which it was taken, and was not used at said former trial; said Young being then present and sworn as a witness for the plaintiff. The admission of such copy was objected to by the defendant's counsel; the plaintiff's counsel at the same time calling for the production of the original, but it was not produced. The presiding judge overruled the objection and admitted in evidence.

The plaintiff also offered John W. Smith as a witness to prove that Benjamin Knight, who was one of the directors of said Insurance Company, then and also at the time said insurance was effected, some short time after the loss of said schooner on the tenth of June, 1834 stated he, said Knight, and the other directors of said Insurance Company knew when the policy was effected that said schooner was not a new vessel, but was the old sloop Sophronio built upon. To the admission of this testimony the counsel for the defendant objected, inasmuch as said Knight was living in Portland, and might be examined by the plaintiff as a witness, but said judge overruled said objection and said Smith was admitted as a witness for the above purpose, and testified accordingly in said cause, though he said Smith was then a stockholder in said Insurance Company. And *afterwards*, the said Knight having sold out his stock, was offered and admitted a witness on the part of the defendant and contradicted the testimony of said Smith.

The defendant then offered to read to the jury the depositions of Timothy Parsons, George Wear, and Jeremiah Freeman, which were taken upon due notice and the counsel for the plaintiff was present at the taking of the same. Those depositions contained certain declarations, testified to by them to have been made by Joseph Bean who was on board said vessel just before she sunk and was lost, and was also a witness for the plaintiff, sworn and examined on the former trial of this cause; but was not offered as a witness at the present trial, tho' present in court. Those declarations have a tendency to support the charge, and warrant the conclusion of gross negligence in the management of the vessel, such as to discharge the defendant, and were comprised in the body of said depositions; and without any objection made thereto at the time, in answer to questions put by the defendant's counsel; to which no objection was then made, and in answer to questions put by the plaintiff's counsel, without any restrictions or limitations; and the defendant's counsel contended that such *declarations* and *answers* were allowable to be read to the jury, inasmuch

as no objections were made to them, or to the questions of the plaintiff at the time they were taken, *and such as were in answer to questions proposed by the plaintiff.* But said judge ruled that such declarations, and answers were not admissible in the cause, and excluded them; said depositions are referred to as making part of the case.

The plantiff read to the jury the contract of which a copy is annexed, between the plaintiff and Joseph Bean and John Polley's; and it was proved that said Bean was at Cape Neddick, near which the vessel sunk, while efforts were made by persons employed by the Insurance Company for the purpose of raising said vessel from the place where she sunk, in about seventeen fathoms of water. And the defendant's counsel contended that by the terms of said contract Bean was the agent of the plaintiff at that time, and in such a situation as to render his declarations as admissible in evidence, and the defendant offered proof of said Bean's declaration, tending to show unseaworthiness of said vessel, and gross negligence in the management of the vessel, and criminality of conduct in the circumstances occasioning her loss; and particularly what said Bean said, were the *wishes* of the plaintiff as to having said vessel raised from the place where she then was lying. But said judge refused to admit proof of such declarations; the cause was thereupon submitted to the jury, who returned their verdict in favor of the plaintiff; and because the foregoing facts and exceptions to the rulings of said judge, do not appear on the record of the verdict aforesaid, the said counsel for the defendant, did then and there propose their said exceptions to the opinion and ruling of the said judge, and requested the said judge to sign and put his seal to this bill of exceptions containing the matters aforesaid, according to the form of the statute in such case made and provided. And thereupon the said judge, at the request of said counsel for defendant, did sign and put his seal to this bill of exceptions on the twenty-first day of January in the year eighteen hundred and thirty-seven.

The foregoing exceptions having been reduced to writing and presented to the court before the adjournment thereof without day, and being found to be conformable to the truth of the case, are hereby allowed and signed.

In witness whereof, I have hereunto set my hand and seal, this twenty-first day of January, in the year of our Lord eighteeen hundred and thirty-seven.

NICHOLAS EMERY, [L. S.]
Jus. Sup. Jud. Court.

STATE OF MAINE—*Cumberland, ss.*

At the Supreme Judicial Court, begun and holden at Portland, within and for the county of Cumberland aforesaid, on *on* the Tuesday next but one preceding the last Tuesday of April, in the year of our Lord eighteen hundred and thirty-eight.

Present:

Hon. NATHAN WESTON, *Chief Justice.*
NICHOLAS EMERY, } *Associate Justices.*
ETHER SHEPLEY, }

William Polleys of Cape Elizabeth, in said county, gentleman, in a plea of the case, for that the said Polleys, the plaintiff, on the seventeenth day of July, in the year of our Lord one thousand eight hundred and thirty-three, at Portland aforesaid, according to the custom of merchants, a certain writing, commonly called a policy of insurance, caused to be made by, and between himself and the defendants, purporting thereby, and containing therein, that the said William Polleys, did make insurance, and caused himself to be insured, lost or not lost, by the defendants, the sum of three thousand dollars, upon the schooner Mary, at sea, or in port, for one year, commencing the risk July the eleventh, one thousand eight hundred and thirty-three, at noon, and ending July eleventh, eighteen hundred and thirty-four, at noon, according to, and by the said policy, in the words and figures following, to wit:

No. 331—Ocean Insurance Company.

This policy of insurance, witnesseth, that the President and Directors of the Ocean Insurance Company, do by these presents, cause to be insured, lost or not lost, William Polleys three thousand dollars on the schooner Mary, at sea or in port, for one year, commencing the risk July eleventh, 1833, at noon, and ending July eleventh, 1834, at noon; whereof is master for this present voyage, Lovett, or whosoever else shall be master in the said vessel, or by whatsoever other name or names, the said vessel or master thereof, is, or shall be named, or called; beginning he adventure upon the said sch'r as aforesaid, and to continue during the vovage aforesaid, on the vessel, until she shall be arrived and moored at anchor twenty-four hours in safety, and on the property until landed.

Sum Insured $3,000.

And it shall be lawful for the said vessel, in her voyage, to procced and sail to, touch and stay at, any ports or places, if thereunto obliged by stress of weather, or other unavoidable accidents, without prejudice to this insurance.

Touching the adventures and perils, which the said Insurance Company are contented to bear, and take upon them in this voyage, they are of the seas, fire, enemies, pirates, assailing thieves, restraints and detainments of all kings, princes, or people, of what nation or quality soever. Barratry of the master, (unless the insured be owner of the vessel,) and of mariners, and all other losses and misfortues, which have, or shall come to the damage of the said sch'r, or any part thereof, to which insurers are liable, by the rules and customs of insurance in Portland, provided that the insurers shall not be liable for

any partial loss on hemp and flax, unles the loss amount to twenty per cent. on the whole aggregate value of such articles; nor for any partial loss on sugar, flax seed, bread, tobacco, and rice, unless the loss amount to seven per cent. on the whole aggregate value of such articles; nor for any partial loss on salt, grain, fish, fruit, hides, skins, or other goods that are esteemed perishable in their own nature, unless it amount to seven per cent. on the whole aggregate value of such articles, and happen by stranding; nor for any partial loss on other goods, or on the vessel or freight, unless it amount to five per cent., exclusive in each case of all charges and expenses incurred for the purpose of ascertaining and proving the loss; but the owners of such goods shall recover on a general average.

Vessel Valued at $3,000, *Premium Included.*

And in case of any loss, or misfortune, it shall be lawful for the insured, his factors, servants, and assigns, to sue, labor, and travel for, in and about the defence, safeguard and recovery of the said sch'r, or any part thereof, without prejudice to this insurance, to the charges whereof the said Insurance Company, will contribute in proportion as the sum insured is to the whole sum at risk.

And so the President and Directors aforesaid, are contented, and do hereby bind the capital stock, and other common property of the said Insurance Company, to the insured, his executors, administrators and assigns, for the true performance of the premises, confessing themselves paid, the consideration due unto them for this insurance, by the insured, at and after the rate of twelve pr. cent. return premium to be made, if she lies up in the winter, from the time the company are notified.

Premium - -	$22 50
Policy - -	1
	$23 50

And it is hereby agreed, that if the insured shall have made any other insurance upon the sch'r aforesaid, prior in date to this policy, then the Insurance Company shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the property at risk, whether for the whole voyage, or from one port of lading or discharge to another; and the said Insurance Company shall return the premium, or a ratable part thereof, upon so much of the sum by them insured, or for such part of the voyage, as they shall be exhonerated from such prior insurance, excepting half per cent. which shall be retained in all cases of return premium, provided that no return premium shall be made for any passage whereon the risk has once commenced.

And in case of any insurance upon the said sch'r, whether it be for the whole or part of the voyage, subsequent in date to this policy, the said Insurance Company shall nevertheless be answerable to the

full extent of the sum, by them herein insured, without right to claim contribution from such subsequent insurers, and shall accordingly be entitled to retain the premium by them received, in the same manner, as if no such subsequent insurance had been made. And in case of loss, such loss shall be paid in sixty days after proof and adjustment thereof; the amount of the premium note, if unpaid, and all sums due to the company from the insured, when such loss becomes due, being first deducted, and all sums coming due being first paid or secured, to the satisfaction of the said President and Directors, they discounting interest for anticipating payment.

It is also agreed, that in case of capture or detention, the insured shall not have the right to abandon therefor, until proof is exhibited of condemnation, or of the continuance of the detention, (by capture or other arrest,) for at least ninety days; and that the insured shall not abandon in consequence of the port of destination being blockaded; but the vessel shall in such case, have liberty to proceed to another port not blockaded, and there end the voyage, or wait a reasonable time for the blockade of the original port of destination to be raised; and that the acts of the insured or insurers, in recovering, saving and preserving the property insured in case of disaster, shall not be considered a waver or acceptance of an abandonment.

It is also agreed, that the insurers shall not be answerable for any charge, damage, or loss, which may arise in consequence of seizure or detention, for, or on account of illicit, or prohibited trade, or trade in articles contraband of war; but the judgment of a foreign consular, or colonial court, shall not be conclusive upon the parties, as to the fact of there having been articles contraband of war on board, or as to the fact of an attempt to trade in violation of the laws of nations.

It is also agreed, that this policy shall be void, in case of its being assigned, transferred, or pledged without the previous consent in writing of the insurers.

It is also agreed, that the insurers shall not have the right to abandon the vessel, for the amount of damage merely, unless the amount which the insurers would be liable to pay under an adjustment, as of partial loss, shall exceed half of the amount insured; and in case of a total loss of the vessel, with salvage, the amoumt allowed out of the salvage to the officers and crew for wages earned, or services rendered previously to the loss, shall be considered as so much of the salvage applied to the use of the ship owners, even although the same should be allowed or paid, under the name of salvage, and not as wages, and shall accordingly be deducted in adjusting the loss.

It is agreed, that if any dispute shall arise, relating to a loss on this policy, it shall be submitted to the judgment and determination of arbitrators mutually chosen, whose award in writing shall be conclusive and binding on all parties.

The company is not liable for wages or provisions, except in general average.

In witness whereof, the President of the said Ocean Insurance Company, hath hereunto subscribed his name, and caused the same to be countersigned by the secretary, at their office, in Portland, this sev-

enteenth day of July, one thousand eight hundred and thirty-three.

PHILLIP GREELEY, *President.*
WM. H. WOOD, *Secretary.*

Of which writing of assurance, made as above set forth, the said defendants had due notice.

And thereupon, thereafterwards, on the same day, in consideration that the said plaintiff had paid to defendants, the premium for three thousand dollars, according to the tenor of the aforesaid assurance, and promised to perform all things contained in the writing aforesaid on his, the said plaintiff's part, to be performed, the said defendants promised the said plaintiff that they would become, and they said defendants did then and there become assurers of the said vessel, for the time aforesaid, according to the tenor and effect of the writing aforesaid, for the said sum of three thousand dollars, to be assured by the writing aforesaid, being the sum by said defendants subscribed as aforesaid, and the said schooner Mary, on the tenth day of June, in the year of our Lord one thousand eight hundred and thirty-four, upon the high seas, by storms and the violence of the seas, upon a a voyage or trip, which the said schooner was then performing from Portland, in the State of Maine, to Boston, in the Commonwealth of Massachusetts, was sunk and utterly lost.

And the plaintiff in fact avers, that he was, at the time of effecting said policy of insurance, the true, and lawful, and sole owner, of the said schooner Mary that she was of the full and just value of three thousand dollars that he continued to be the true, lawful, and sole owner of said shooner Mary, from that time up to the time and day when the said schooner Mary was sunk and lost, as aforesaid.

Of all which, the said defendants, at Portland aforesaid, to wit, on the fourteenth day of June, last past, had notice and proof, and the said Polleys, the plaintiff, then and there abandoned to the defendants.

And although the said plaintiff hath performed all things on his part, by virtue of said policy, to be performed and done, yet the said defendants have not paid to the plaintiff the said sum of three thousand dollars, or any part thereof, although the said plaintiff, to wit, on the twentieth day of August current, demanded of, and requested the said defendants, to pay the same.

To the damage of the said plaintiff, (as he says,) the sum of five thousand dollars.

This action was commenced and entered at the November term of this court, A. D. 1834, and continued from term to term to the November term of said court, A. D. 1836, when and where the parties appeared, and the said Ocean Insurance Company come and defend when, &c., and where, &c., and for plea, say, they never promised in